U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 565-5330
(202) 565-5325 (FAX)

DATE: August 18, 2000

CASE NO: 1999-INA-305

In the Matter of

RICHARD COHEN
Employer

on behalf of

CONCHITA Q. CATADA
Alien

Appearances: Michael B. Schwartz, Esq.
For Employer and Alien

Certifying Officer: Richard E. Panati, Region III

Before: Burke, Huddleston, and Jarvis
Administrative Law Judges

DONALD B. JARVIS
Administrative Law Judge

DECISION AND ORDER FOLLOWING REMAND

This case arises from Richard Cohen's ("Employer") request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an application for alien labor certification. The certification of aliens for permanent employment is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under §212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at

the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of the United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other means in order to make a good faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. §656.27(c).

Statement of the Case

On August 20, 1996, the Employer filed a Form ETA 750 Application for Alien Employment Certification on behalf of the Alien, Conchita Catada. (AF 51-52). The job opportunity was listed as "Cook". (AF 51). The job duties were described as follows:

> Plans and prepares meals for family and guests for personal and business gatherings on regular basis. Inventories kitchen adequate supplies, utensils and foodstuffs for meal preparation. Orders necessary ingredients for preparation of food.

(Id.). The stated job requirements for the position, as set forth on the application, are two years of "Cook related employment experience." (Id.).

On April 27, 1999, this matter was remanded under 1999-INA-109 for the purpose of allowing the CO to issue a supplemental NOF for reevaluation of the application consistent with the *en banc* decisions in *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (*en banc*), *Daisy Schimoler*, 1997-INA-218 (Mar. 3, 1999) (*en banc*) and *Elain Bunzel*, 1997-INA-481 (Mar. 3, 1999) (*en banc*). (AF 19-21).

The CO issued a supplemental Notice of Findings ("NOF") on July 6, 1999, consistent with the guidelines established in the case of *Carlos Uy III*. (AF 16-18). The CO found that the job opportunity must be clearly open to U.S. workers , citing section 656.20(c)(8). The CO noted that the application contained insufficient information to determine whether the position of Domestic Cook actually exists in Employer's household or whether the job was created solely for the purpose of qualifying the alien as a

skilled worker under current immigration law. The CO set forth 10 questions for the Employer to answer in his rebuttal and explained that little weight would be accorded to conclusory statements.[1] (AF 17).

The Employer submitted his rebuttal to the NOF on August 11, 1999, in the form of a letter from Employer's attorney, an affidavit written and signed by Employer, and pictures of Employer's kitchen and dining room. (AF 4-15). The Employer's attorney initially addressed the Decision and Order remanding this case and argued that the reissuance of the NOF "fails to address the issues mandated in the Daisy Schimoler and Carlos Uy III Decisions of the Board of Alien Labor Certification Appeals." (AF 4) *See Daisy Schimoler*, supra; *Carlos Uy III*, supra. The Attorney asserted that the initial response submitted by Employer dated September 1, 1998, and the Affidavit of Employer dated September 1, 1998 and the photographs submitted by Employer "sufficiently and fully addresses all issues relating to the bona fide nature of the subject employment position." (AF 4-5). The Employer, therefore, resubmitted a copy of the original rebuttal. The only new issues addressed by Employer's attorney was that "no 'special' relationship between applicant and alien exists and the parties are not related by blood or family ties. No 'special friendship' exists between the parties, except the friendship accumulated over a significant period of association." (AF 5). Employer's attorney also asserted that Employer is well able to afford the costs incident to the employment of a household cook, although no tax returns were submitted. The Employer's originally submitted affidavit provided that: there are no children residing in the household; general household cleaning duties are performed by an additional part-time worker; and, Employer entertains between 6 and 30 guests periodically throughout any given month. (AF 10-11). In addition, Employer asserted that he is required to closely monitor the foods that he eats and is on a special diet which requires the preparation of "specific foods and specially prepared sauces, which are very labor intensive." (AF 11). No documents were offered in support of this statement.

The CO issued a Final Determination ("FD") on April 12, 1999, denying certification. (AF 2-3). The CO found that Employer failed to establish that there is a bona fide position for a Domestic Cook in

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[1] The CO required the Employer to provide the following in its rebuttal: the number of meals prepared per day and per week; the length of time to prepare these meals; the number of people for whom the meals are prepared; a detailed list of how often Employer entertained in the twelve calendar months immediately preceding the filing of the application with a list of dates, the number of guests entertained, and the number of meals served; if there are pre-school aged children residing in the household; any special dietary circumstances of the household which must be accompanied by a physician's statement; the percentage of Employer's household income devoted to paying the Alien's salary supported by a copy of Employer's Federal Income Tax Return for the immediately preceding calendar year; if there are other domestic workers employed in the household; whether the household has ever employed a Domestic Cook; when the Alien was initially hired; what the alien's training and experience is as a cook; how the alien learned of the job offer; and, the nature of the relationship between the Alien and Employer. (AF 17-18).

Employer's household, in violation of 20 C.F.R. § 656.20(c)(8). (AF 3). The CO found that the rebuttal evidence shows that it is:

> more likely that the alien will be employed as a General Houseworker than a Domestic Cook. Your rebuttal evidence does not show that you entertain frequently (in fact, no entertainment schedule was provided) or that the alien will be involved on a full-time basis preparing meals for family members to consume. Most family members are outside the home working or involved in charitable works or personal engagements for the greater part of the alien's daily work schedule (8:30 a.m. to 5:00 p.m.)

(Id.). In addition, the CO noted that while the Employer asserted that he is able to afford the services of the Alien, Employer did not provide a copy of a Federal Income Tax Return as requested to support this statement. (Id). For these reasons, the CO found that while the alien may cook some meals, it is "implausible that the alien will be engaged as a full-time Domestic Cook because there is no one at home to eat most of the meals that the alien supposedly will prepare and serve." (Id.).

The Employer filed a Request for Review on August 27, 1999. (AF 1). The file was then forwarded to the Board of Alien Labor Certification Appeals ("BALCA") for review. The Employer then filed a Statement of Position on October 21, 1999.

Discussion

In *Carlos Uy, III, 1997-INA-304* (Mar. 3, 1999) (*en banc*), the Board held that a CO may properly invoke the *bona fide* job opportunity analysis authorized by 20 C.F.R. 656.20(c)(8) if the CO suspects that the application misrepresents the position offered as skilled rather than unskilled labor in order to avoid the numerical limitation on visas for unskilled labor. When the CO invokes section 656.20(c)(8), however, administrative due process mandates that he or she specify precisely why the application does not appear to state a bona fide job opportunity. It is the employer's burden following the issuance of an NOF to perfect a record that is sufficient to establish that a certification be granted. The Board in *Uy* rejected the employer's contention that where a CO does not request a specific type of document, an undocumented assertion must be accepted and certification granted.

In this case, the CO requested responses to several inquiries concerning whether the position of Domestic Cook actually exists in Employer's household and requested documentation to support these responses. The Employer responded with undocumented assertions about the number of meals and the schedule of entertaining. The Employer asserted that general household cleaning duties would be performed by an additional part-time worker, but no evidence of this was submitted. In addition, Employer asserted that he is "well able to afford the costs incident to the employment of a household cook in his household." (AF 5). Employer, however, failed to submit a copy of his Federal Tax Return for the immediately preceding calendar year which was specifically requested in the NOF. (AF 18). Where the CO requests a document or information which has a direct bearing on the resolution of the issue and is obtainable by reasonable effort, the employer must produce it. *See Gencorp*, 1987-INA-659 (Jan. 13,

1989) (*en banc*). Employer's bare assertions are insufficient to carry the Employer's burden of proof required to sustain alien labor certification. *See Jane B. Horn*, 1994-INA-6 (Nov. 30, 1994); *Dr. Daryao S. Khatri*, 1994-INA-16 (Mar. 31, 1995).

Accordingly, we find the CO's denial of certification was proper.

Order

The Certifying Officer's denial of labor certification is hereby AFFIRMED.

For the Panel:

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DONALD B. JARVIS

Administrative Law Judge

San Francisco, California